

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MACEDONIO LUNA)	
Claimant)	
VS.)	
)	
KAN-TEX FEEDERS, INC.)	Docket Nos. 202,235
Respondent)	& 205,193
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from the Award of Administrative Law Judge Jon L. Frobish dated September 1, 1998. The Administrative Law Judge granted claimant benefits for a 24 percent permanent partial disability on a functional basis for the injury of April 21, 1995, but denied claimant benefits for the accidental injury alleged on August 24, 1995. The Administrative Law Judge also denied claimant a work disability for the April 21, 1995, accident, finding that claimant had the ability to perform the accommodated job provided by respondent.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Malone of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability? Particularly, is claimant entitled to a functional impairment or a work disability for the injuries suffered on April 21, 1995? Did claimant put

forth a good faith effort in obtaining or maintaining employment after the injury?

- (2) Did claimant provide timely notice of the August 24, 1995, accident in Docket Number 205,193?
- (3) What, if any, is claimant's functional impairment from the injury of August 24, 1995, in Docket Number 205,193?
- (4) Did the Administrative Law Judge err in not assessing a portion of the court costs to the claimant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent on September 27, 1994, as a truck driver, dispensing food for respondent's cattle operation. On April 21, 1995, while lifting a tire, claimant suffered accidental injury to his low back. Claimant was off work for approximately nine days and was referred to Dr. M. J. Ramirez for treatment. Dr. Ramirez treated claimant conservatively, releasing him to return to work on May 4, 1995. Claimant actually returned to work on May 5, 1995, and continued working until approximately May 24 or 26, 1995, when Dr. Ramirez again took him off work.

Claimant was offered a light-duty job from respondent after respondent had conversations with Dr. Ramirez regarding what restrictions would be appropriate. He returned to work with respondent on August 23, 1995, and began working a job called washing tanks. Claimant described this job as "jump corrals." Claimant testified that, while working the tank washing job on August 24, 1995, he began to feel worse. He attributed his physical difficulties to having to jump over the fences between the tanks. He also described difficulty in pulling a plastic tube out of the water tank and having to strike it with a brush. He also testified that this job was difficult because, while he was cleaning the tanks, the cattle would "fall on him."

Claimant alleges he advised his foreman, Jim Fink, of these difficulties and, on August 30, 1995, claimant left work, alleging he could no longer stand the pain associated with the job.

Claimant was referred to Dr. C. Reiff Brown, a board certified orthopedic surgeon, at the request of the respondent's insurance company. Dr. Brown examined claimant, diagnosing spondylolisthesis at L4-5 and spinal stenosis. He assessed claimant a 13 percent whole body functional impairment as a result of the spondylolisthesis and loss of range of motion in the lumbar spine. This was pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Dr. Brown recommended claimant avoid frequent bending, meaning 200 times a day or more, and restricted claimant's lifting to 50 pounds maximum. He also restricted claimant's pushing and pulling to no greater than 100 pounds on an occasional basis, 60 pounds on a frequent basis, but did not restrict claimant regarding standing or walking.

Claimant was referred to Dr. Edward Prostic, a board certified orthopedic surgeon, by claimant's attorney. He examined claimant on March 20, 1996, diagnosing lumbar spinal stenosis and severe degenerative changes at L4-L5. He assessed claimant a 35 percent whole body impairment, with 30 percent of that being related to the April 21, 1995, accident and 5 percent being related to the August 24, 1995, accident. He restricted claimant from lifting greater than 20 pounds occasionally, and 10 pounds repetitively, and recommended he avoid bending or twisting, forceful pushing and pulling, and the use of vibratory equipment. He also recommended claimant be allowed to change positions frequently and not be required to do prolonged standing or walking. He felt claimant should not stand more than 45 minutes per hour, nor walk more than 20 to 30 minutes per hour. These restrictions could be adjusted by the level of claimant's physical symptoms. He also recommended claimant not bend or stoop more than three to four times per hour. His impairment rating was also pursuant to the AMA Guides, Third Edition (Revised). Dr. Prostic was presented with a task loss analysis performed by Michael Dreiling. Dr. Prostic adopted the opinion of Mr. Dreiling, finding that claimant had lost 75 percent of his ability to perform job tasks.

When claimant was returned to work light duty with respondent, he was put on a job called cleaning water tanks. This job, which was videotaped and described in detail by Jim Harding, the respondent's manager, and Jim Fink, respondent's feed foreman and yard foreman, required that claimant travel from water tank to water tank throughout the feed yards, draining the tanks, and removing the sediment scum which had settled on top of the water. Claimant removed a small plug from either the side or the bottom of the tank, and brushed the water towards the drain hole. It also required that claimant remove the food and dirt scum, which had accumulated along the edges of the tank, while the water was draining.

Claimant contended this job required that he climb or jump the fences between the corrals. Respondent's videotape and the depiction of the job by Mr. Harding and Mr. Fink show that claimant could travel between the pens through the connecting gates. The physical activities involved in opening and closing the gates, as depicted in the videotape, appeared minimal. In addition, Mr. Harding testified that safety concerns would prohibit

claimant from climbing or jumping over the fences. Respondent required that the gates be used.

Both Dr. Prostic and Dr. Brown were given the opportunity to view the videotape of the water tank cleaning jobs. Dr. Brown felt that the water tank cleaning job was well within the limitations he placed upon claimant, and that claimant could perform these jobs within his restrictions. Dr. Prostic felt claimant could perform the tasks he viewed on the videotape. However, Dr. Prostic did express concern regarding the amount of walking involved in the job.

Dr. Prostic and Dr. Brown disagree on whether claimant was a surgery candidate. Dr. Prostic felt claimant had a progressive condition, which would only get worse and was only reversible by a decompression surgery which claimant elected not to undergo. Dr. Brown, on the other hand, felt claimant was not a candidate for surgery. He felt a simple decompression procedure would not solve the major part of claimant's problems.

Claimant returned to work with respondent on August 23, 1995, performing the water tank cleaning operation. He continued doing this job through his last day of work on August 30, 1995, at which time he simply left the job. Both Mr. Harding and Mr. Fink testified that claimant did not complain to them that the tank washing job was outside of his restrictions. Further, they both contend that claimant never requested a transfer to a different job. Neither ever observed claimant jumping over or climbing over a fence, and they were never made aware that claimant was doing the fence jumping. Both recommended that travel between the various pens be done through the gates. The videotape indicated that the opening and closing of gates was a relatively simple procedure with little physical action required. Both men also testified that, had claimant remained with respondent, he would have continued doing the water tank cleaning job, which is required daily.

Respondent currently has another individual, by the name of Kenneth Stephenson, cleaning the water tanks on a regular basis. While Mr. Stephenson did not testify, the deposition of Cary Droste was taken. Mr. Droste is a private investigator who interviewed Mr. Stephenson and testified regarding Mr. Stephenson's description of the tank cleaning job. Respondent lodged several hearsay objections to this testimony. Mr. Stephenson's description, provided through Mr. Droste's testimony, appears to be more similar to that depicted in the videotape presented by respondent's representative than that provided by claimant. Mr. Stephenson did not jump the gates or climb over the corrals. He instead went through the gates between the pens. He also had no difficulty with the cattle bothering him or falling on him. He described the job as requiring very little physical strain.

Claimant acknowledges, after having left respondent's employment on August 30, 1995, he has neither sought nor been offered any work. He is currently on Social Security

disability and has a medical card. At the time of the regular hearing, claimant was living in Anthony, New Mexico, with his wife.

Claimant alleges he spoke to Mr. Fink and to Jesus Torres, another foreman, about the difficulties he was having performing the tank cleaning job. Mr. Fink denies being advised that claimant was having any difficulties. Mr. Torres, who is claimant's son-in-law, was not called to testify in this matter.

CONCLUSIONS OF LAW

Docket No. 202,235

The parties acknowledge claimant suffered accidental injury arising out of and in the course of his employment on April 21, 1995, in Docket Number 202,235. The Administrative Law Judge, in considering the opinions of both Dr. Prostic and Dr. Brown, found claimant had suffered a 24 percent permanent partial functional disability to the body as a whole as a result of those injuries. In considering the evidence, the Appeals Board agrees, finding claimant to have suffered a 24 percent functional impairment on that date.

Docket No. 205,193

With regard to the August 24, 1995, aggravation, the Administrative Law Judge found claimant had failed to provide timely notice of that injury. Again, the Appeals Board agrees, finding the testimony of Mr. Harding and of Mr. Fink to be more persuasive. The Appeals Board affirms the finding that claimant failed to provide timely notice of an accidental injury pursuant to K.S.A. 44-520 for the accident of August 24, 1995. Additionally, claimant failed to advise either Mr. Harding or Mr. Fink that he was having difficulties performing the job and, on August 30, 1995, simply left his employment with respondent, never to return.

Claimant alleges entitlement to a substantial work disability as a result of the April 21, 1995, accident. K.S.A. 44-510e defines permanent partial disability as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 44-510e goes on to state:

An employee shall not be entitled to receive permanent partial general disability benefits in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant returned to work with respondent at an accommodated job, cleaning tanks, at a comparable wage. Claimant then left the employment on August 30, 1995, giving up the light-duty job that had been provided. With regard to the nature and extent of injury or disability, the Appeals Board must consider respondent's contention that claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proper job that the worker has the ability to perform. In this instance, claimant was offered and accepted, for a short period, the tank cleaning job. Both Dr. Prostic and Dr. Brown felt claimant could perform that job, although Dr. Prostic did express some concern about the amount of walking involved. After reviewing the videotape and the testimony of Mr. Harding and Mr. Fink, the Appeals Board finds that claimant did have the ability to perform that job and, by leaving the job on August 30, 1995, has violated the principles set forth in Foulk.

In addition, after leaving respondent's employment, claimant acknowledges he has made no attempt to seek employment with any other employer. The Court of Appeals, in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), obligated that a claimant make a good faith effort to obtain post-injury employment. If a claimant does not put forth a good faith effort, then the trier of facts is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. The Board finds that claimant had the ability to return to work with respondent at the accommodated job, at a comparable wage.

Finally, respondent argues in its brief that court costs should be apportioned between claimant and respondent, in part, due to the lengthy cross-examination performed by claimant's counsel during the litigation of this case. The Appeals Board notes that, while only nine people testified in this matter, there are twenty-one different transcripts, indicating that several witnesses were deposed on more than one occasion. The disputes regarding the job claimant was offered and the physical aspects of that job were significant. Claimant contended he was entitled to a substantial work disability. Respondent contended claimant was entitled to, at most, a functional impairment for one accident and nothing for the second accident. The Appeals Board acknowledges that, while an administrative law judge has the authority to assess costs against any party, it is traditional in workers' compensation litigation that the respondent pays for the cost of transcripts. Only in unusual situations, where abuse or harassment are involved, should the assessment of costs against claimant be entered. The evidence provided in this matter

does not display an abusive or harassing attitude on the part of claimant or claimant's attorney. The multiple depositions required of some witnesses, while not judicially economic, did appear to be necessary for the entire story to be told. The Appeals Board, therefore, finds that an assessment of costs against the claimant is not appropriate, and respondent's request is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated September 1, 1998, should be, and is hereby, affirmed, and claimant is granted an award for a 24 percent permanent partial general body disability for the accident of April 21, 1995.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Terry J. Malone, Dodge City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director